(1)

91-1716

Supreme Court, U.S.
FILED
APR 28 1992
OFFICE OF THE CLERK

No. 91-____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

JANICE J. JERABEK, JEANNE MAHAN,
DIANNE FOSTER,

Petitioners,

v.

AFL-CIO, *et al.*,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

PETITION FOR A WRIT OF CERTIORARI

MILTON L. CHAPPELL
c/o National Right to Work Legal
Defense Foundation, Inc.
8001 Braddock Road, Suite 600
Springfield, Virginia 22160
1-703-321-8510

COUNSEL OF RECORD
FOR PETITIONERS

April 1992

QUESTION PRESENTED

Does a state regulation which governs the collection of compulsory union fees from public employees comply with *Chicago Teachers Union v. Hudson*, 475 U.S. 292, 305, 307 n.20, 310 (1986), and First Amendment due process where the regulation permits labor organizations to give the constitutionally mandated notice and financial disclosure concurrent with, rather than in advance of, the initial compulsory fee seizure?

PARTIES TO THE PROCEEDINGS BELOW

In addition to the parties named in the caption, the parties to the proceeding in the court whose judgment is sought to be reviewed were:

> **Respondents:** Service Employees International Union; American Federation of State, County and Municipal Employees; California Teachers Association and California School Employees Association.

In addition to the parties in the state court of appeal, the State of California Public Employment Relations Board ("PERB"), the original defendant, was a party to the original proceeding in the superior court. However, only the intervening unions appealed the judgment favorable to the petitioners herein to the court of appeal. Accordingly, PERB was not a party to the proceeding in the court whose judgment is sought to be reviewed.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

PARTIES TO THE PROCEEDINGS BELOW ii

TABLE OF AUTHORITIES v

OPINIONS BELOW 2

JURISDICTION 2

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 2

STATEMENT OF THE CASE 3

REASON FOR GRANTING THE WRIT 6

IN UPHOLDING THE CONSTITUTIONALITY OF REGULATIONS THAT PERMIT UNIONS TO DISTRIBUTE THE *HUDSON* NOTICE OF THE AMOUNT OF AND BASIS FOR THE AGENCY FEE CONCURRENT WITH, BUT NOT BEFORE, THE COMPULSORY FEE SEIZURE, THE STATE COURT OF APPEAL'S DECISION CONFLICTS WITH THIS COURT'S DECISIONS IN *HUDSON* AND ITS PRECURSORS, AS WELL AS DECISIONS OF FOUR FEDERAL COURTS OF APPEALS 6

A. The Conflict With *Hudson* and Its Precursors 6

B. The Conflict With the Courts of Appeals 11

CONCLUSION 14

TABLE OF CONTENTS (continued)

Page

APPENDICES

A. Decision of the Court of Appeal of the State of California (Oct. 29, 1991) 1a

B. Decision of the Superior Court of the State of California (Mar. 26, 1990) 14a

C. Denial of Petition for Review Filed by the Supreme Court of the State of California (Jan. 30, 1992) 19a

D. California Public Employment Relations Board's Agency Fee Regulations, Cal. Code Regs. tit. 8, §§ 32990-32997 (1989) 20a

TABLE OF AUTHORITIES

Page

CASES

Abood v. Detroit Bd. of Educ., 431 U.S. 209 (1977) 13

Chicago Teachers Union v. Hudson,
475 U.S. 292 (1986) ..... *passim*

Cleveland Bd. of Educ. v. Loudermill,
470 U.S. 532 (1985) 8

Dashiell v. Montgomery County,
925 F.2d 750 (4th Cir. 1991) 12

Dean v. TWA, 924 F.2d 805 (9th Cir. 1991) 11

Dixon v. City of Chicago, 669 F. Supp. 851
(N.D. Ill. 1987) 12

Ellis v. Railway Clerks, 466 U.S. 435 (1984) 7

Fuentes v. Shevin, 407 U.S. 67 (1972) 8

Galda v. Bloustein, 686 F.2d 159 (3d Cir. 1982) 13

Gilpin v. AFSCME, 643 F. Supp. 733 (C.D. Ill. 1986) 12

Grunwald v. San Bernardino City
Unified School Dist.,
917 F.2d 1223 (9th Cir. 1990),
petition for reh'g pending ..... *passim*

Hudson v. Chicago Teachers Union, 743 F.2d 1187
(7th Cir. 1984), *aff'd*, 475 U.S. 292 (1986) 10

TABLE OF AUTHORITIES (continued)

Page

Keller v. State Bar,
__ U.S. __, 110 S. Ct. 2228 (1990) 13

Lowary v. Lexington Local Bd., 704 F. Supp. 1430
(N.D. Ohio 1987) 12

Mireles v. Waco, __ U.S. __, 112 S. Ct. 286 (1991) 14

Mullane v. Central Hanover Bank & Trust Co.,
339 U.S. 306 (1950) 8

Schneider v. Colegio de Abogados de Puerto Rico,
917 F.2d 620 (1st Cir. 1990) 13

Tierney v. City of Toledo,
824 F.2d 1497 (6th Cir. 1987) 10-12

Zmuda v. Commissioner of Internal Revenue,
731 F.2d 1417 (9th Cir. 1984) 11

CONSTITUTIONAL AND STATUTORY PROVISIONS

U.S. Const. amend. I ..... *passim*

U.S. Const. amend. XIV 2

28 U.S.C. § 1257(a) (West Supp. 1991) 2

California Public Employment Relations Board's
Agency Fee Regulations
§§ 32990-32997, Cal. Code Regs. tit. 8,
§§ 32990-32997 (1989) ..... i, 3

TABLE OF AUTHORITIES (continued)

Page

§ 32992(c), Cal. Code Regs. tit. 8,
§ 32992(c) (1989) 3-6
§ 32995(a), Cal. Code Regs. tit. 8,
§ 32995(a) (1989) 3-5

MISCELLANEOUS

Rules of the United States Supreme Court
Rule 13.1 2
Rule 16.1 14

Stern, Gressman & Shapiro, Supreme Court Practice
(6th ed. 1986) 14

The Supreme Court, 1976 Term,
91 Harv. L. Rev. 1 (1977) 13

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

No. 91-

JANICE J. JERABEK, JEANNE MAHAN,
DIANNE FOSTER,

Petitioners,

v.

AFL-CIO, *et al.,*

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

Petitioners Janice J. Jerabek, Jeanne Mahan and Dianne Foster respectfully pray that a writ of certiorari issue to review the judgment and opinion of the Court of Appeal of the State of California entered on October 29, 1991.

OPINIONS BELOW

The opinion of the California Court of Appeal (Appendix ("App.") A, *infra* 1a) is reported at 2 Cal. App. 4th 1298.[1] The unreported opinion of the California Superior Court is reproduced as Appendix B, *infra* 14a. The Agency Fee Regulations (App. D, *infra* 20a), which are the subject of this litigation, are reported at Cal. Code Regs. tit. 8, §§ 32990 *et seq.* (1989).

JURISDICTION

The judgment of the state court of appeal was entered on October 29, 1991. On January 30, 1992, the Supreme Court of the State of California, the state court of last resort, denied petitioners' petition for review (App. C, *infra* 19a). This petition is filed within 90 days of that date. *See* Supreme Court Rule 13.1. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a) (West Supp. 1991).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment to the United States Constitution states in pertinent part: "Congress shall make no law * * * abridging the freedom of speech * * * or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

Section 1 of the Fourteenth Amendment to the United States Constitution states in pertinent part: "nor shall any State deprive any person of life, liberty, or property, without due process of law."

---

[1]Although the court of appeal originally decided that the decision should not be published, it subsequently recommended publication in the Official Reports, which the Supreme Court of California ordered on January 30, 1992. App. 19a.

The state regulations involved are the California Public Employment Relations Board's Agency Fee Regulations, especially § 32992(c); Cal. Code Regs. tit. 8, § 32992(c) (App. D, *infra* 21a).

STATEMENT OF THE CASE

Attempting to comply with the First Amendment procedural requirements outlined by this Court in *Chicago Teachers Union v. Hudson*, 475 U.S. 292 (1986), PERB promulgated a series of regulations, Cal. Code Regs. tit. 8, §§ 32990-32997, relating to the collection of compulsory agency fees from nonmembers. App. A at 4a; App. D at 20a-24a. However, §§ 32992(c)(2) and 32995(a)(2) of the regulations authorize unions to provide notice outlining the amount of and basis for the agency fee[2] concurrently with, rather than prior to, the first compulsory fee collection, provided all of the collected fees are placed into escrow until after the objectors are identified. App. A at 2a, 4a-5a; App. D at 21a, 23a.

---

[2]The regulations require the notice to contain:

> (1) The amount of the agency fee which is to be expressed as a percentage of the annual dues per member based upon the chargeable expenditures identified in the notice;
> (2) The basis for the calculation of the agency fee; and
> (3) A procedure for appealing all or any part of the agency fee.
> (b) All such calculations shall be made on the basis of an independent audit that shall be made available to the nonmember.

App. D at 20a-21a.

On March 2, 1989, the same day PERB's regulations received state approval, petitioners[3] ("Jerabek") filed an action in superior court against PERB. App. A at 1a-2a, 5a. Their complaint for declaratory and injunctive relief challenged various sections of the regulations for being unconstitutional and in violation of *Hudson*.[4] *Id.*

Respondents AFL-CIO and four public-sector unions ("unions") received permission to intervene in the action as defendants. Cross motions for summary judgment and summary adjudication of the issues were filed, with Jerabek seeking a declaration that the challenged regulations, including the concurrent notice provisions, were unconstitutional, and PERB and the intervening unions seeking a declaration of their constitutionality. App. A at 5a-6a; App. B at 15a.[5]

On March 26, 1990, the superior court granted Jerabek summary judgment and declared the concurrent notice provisions of the regulations, §§ 32992(c)(2) and 32995(a)(2), void and in violation of First Amendment due process,[6] and denied summary

---

[3]Petitioners are three public school employees who do not belong to the union certified as their exclusive bargaining representative, but are required to pay their union an agency fee in lieu of dues.

[4]Specifically, ¶ 25(a) of the complaint alleged: "The Agency Fee Regulations are inconsistent with and contrary to * * * *Hudson*, and thus unconstitutional in that, among other things, those regulations: * * * fail to require notification [to] employees and submission of verified financial information prior to the actual demand for or collection of the reduced fee."

[5]The superior court stated: "The parties have asked for a declaration of whether the agency fee regulations * * * are constitutional." App. at 15a.

[6]"Plaintiffs have also challenged the notice provisions of Section 32992. The regulation's allowance of notice concurrent with collection of compulsory fee deductions is in violation of the Constitution and cannot stand. * * * The Court, therefore, declares the following portions of the regulations to be void: Section 329929(c)(2) [sic] and Section 32995(a)(2)." App. B at 16a-17a.

judgment to defendant PERB and the intervening unions. App. A at 2a, 6a; App. B at 15a-17a. In declaring the sections authorizing concurrent notice unconstitutional, the superior court rejected the intervening unions' "escrow" defense: "The nonmember employee is obviously affected by the concurrent notice procedure proposed. The 100 percent escrow contained in the proposed regulations does not prevent the employee from being deprived o[f] the use of a portion of the employee's earnings prior to being given an opportunity to be heard on any objection." App. B at 17a.

On July 30, 1990, the intervening unions, but not PERB, filed a timely notice of appeal with the state court of appeal. App. A at 2a, 6a & n.2. "On appeal, intervenors assert the two challenged provisions pass constitutional muster. * * * [Thus, t]he sole issue presented in th[e] appeal is one of law, whether the concurrent notice provisions of the adopted regulations comport with *Hudson* requirements." App. A at 2a, 6a.

The court of appeal panel issued its decision on October 29, 1991, which reversed the superior court's judgment and upheld the constitutionality of concurrent notice.[7] App. A at 2a, 6a, 9a-13a. The timely petition for review was denied by the California Supreme Court on January 30, 1992. App. C at 19a.

---

[7]"We conclude the 'concurrent notice with escrow' provisions of sections 32992, subdivision (c)(2) and 32995, subdivision (a)(2) comport with *Hudson* and adequately protect the First Amendment and due process rights of agency fee payers." App. B at 13a.

REASON FOR GRANTING THE WRIT

IN UPHOLDING THE CONSTITUTIONALITY OF REGULATIONS THAT PERMIT UNIONS TO DISTRIBUTE THE *HUDSON* NOTICE OF THE AMOUNT OF AND BASIS FOR THE AGENCY FEE CONCURRENT WITH, BUT NOT BEFORE, THE COMPULSORY FEE SEIZURE, THE STATE COURT OF APPEAL'S DECISION CONFLICTS WITH THIS COURT'S DECISIONS IN *HUDSON* AND ITS PRECURSORS, AS WELL AS DECISIONS OF FOUR FEDERAL COURTS OF APPEALS

The fundamental First Amendment due process right of notice prior to the deprivation of one's property is well settled and stable. This right of advance notice has been consistently and specifically applied by this Court and the federal courts of appeals to the compulsory seizure of union fees from nonmembers. The facts here are not in dispute. The decision below, which denied this fundamental First Amendment due process right, is **clearly** in error, and without any support other than one court of appeals' **dissent**. Therefore, in addition to granting the petition for certiorari, this Court may also wish to consider summary reversal of this clearly erroneous judgment of the California Court of Appeal.

A. The Conflict With *Hudson* and Its Precursors

Under PERB's Agency Fee Regulations, Cal. Code Regs. tit. 8, § 32992(c)(2), unions may begin the compulsory seizure of fees from nonmembers without having already provided them with pre-deprivation notice of 1) the amount of the fee based upon the chargeable expenditures identified in the notice; 2) the basis for the calculation of the fee; 3) the independent audit of the chargeable expenditures; and 4) the procedure for appealing all or any part of the fee amount—as long as this notice is provided concurrent with the first fee seizure. App. D at 20a-21a. The court of appeal held these regulations constitutional, despite their

failure to mandate pre-collection notice. App. A at 12a-13a. That ruling conflicts with this Court's decisions in *Hudson* and other, earlier due process cases.

The minimum "constitutional requirements for the * * * **collection** of [compulsory union] fees include an adequate explanation of the basis for the fee, a reasonably prompt opportunity to challenge the amount of the fee before an impartial decisionmaker, and an escrow for the amounts reasonably in dispute while such challenges are pending." *Hudson*, 475 U.S. at 310 (emphasis added). The regulations approved by the court of appeal do not satisfy the first requirement.

Simply put, the notice under the regulations is untimely. In *Hudson* this Court identified several purposes for the disclosure "of the basis for the fee." They include the due process protection of the nonmember "whose First Amendment rights are being affected [by the agency shop itself,]" by explaining what the deductions from his paycheck will entail and providing him with "a fair opportunity to identify the impact of the governmental [seizure] on his interests and to assert a meritorious First Amendment claim." *Id.* at 303, 307 & n.20. Another purpose of the *Hudson* notice is to avoid a "remedy which merely offers dissenters the possibility of a rebate." *Id.* at 305, 310; *accord Ellis v. Railway Clerks*, 466 U.S. 435, 443-44 (1984).

Hudson, 475 U.S. 307 n.20 (emphasis added), also holds that "the **government and union** have a responsibility to provide **procedures** that minimize th[e] impingement [caused by the agency shop itself on First Amendment rights] and that **facilitate** a nonunion employee's **ability to protect his rights**." Only a notice, especially a notice which triggers escrow, which **precedes** the collection of any compulsory fees can satisfy all of the requirements of *Hudson*.

Moreover, pre-deprivation notice is the usual constitutional requirement: "An essential principle of due process is that a deprivation of life, liberty, or property 'be **preceded by notice** and opportunity for hearing appropriate to the nature of the case.'"

Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532, 542 (1985) (quoting *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 313 (1950) (emphasis added). Furthermore, the notice of taking of property "must be granted at a time when the deprivation can **still be prevented**," because "no damage award can undo the fact that the arbitrary taking that was subject to the right of procedural due process has already occurred." *Fuentes v. Shevin*, 407 U.S. 67, 81-82 (1972).

In light of this Court's holdings, it is astonishing that the court of appeal's gave such meager[8] discussion to the advance notice issue and found "unpersuasive plaintiff's [sic] claim that because the First Amendment requires narrowly drawn procedures, only advance notice of agency fees can be found constitutional," App. A at 12a. Even more shocking is the court's insistence, *id.* at 11a-12a, in relying on the dissent in *Grunwald v. San Bernardino City Unified School District*, 917 F.2d 1223, 1230-33 (9th Cir. 1990), *petition for reh'g pending*, instead of following the ruling of the Ninth Circuit majority and the four other circuits on this issue. *See infra* pp. 11-13. Both the court of appeal and the *Grunwald* dissent erroneously believe escrow[9]

---

[8]Although the court of appeal admitted that the only issue presented was whether concurrent notice complies with First Amendment due process, it spent most of the decision discussing "straw men" issues not presented. First, it discussed the importance of preventing the union from having access to the nonmembers' funds to use for political, ideological or other nonrepresentational purposes and noted that the required escrow account averts this problem, App. A at 8a-9a, even though Jerabek never challenged the regulations' escrow requirements or the unions' use of nonmembers' funds. Second, the court discussed the "advanced reduction" issue, *id.* at 9a-12a, while admitting "that the only issue before us in this case is the constitutionality of the concurrent notice provisions of the promulgated regulations." *Id.* at 10a n.4.

[9]Obviously, if there were no escrow requirement, then the PERB regulations would contain an additional defect. However, since escrow is required, escrow was not an issue before the court of appeal and its escrow discussion is misplaced and irrelevant to the sole issue before it—whether the concurrent notice option complies with First Amendment due process.

cures all First Amendment due process defects in compulsory fee seizures, although *Hudson*, 475 U.S. at 304, 309, 310 (emphasis added) definitively rejected that same position when it was presented by the Chicago Teachers Union.

> [W]e must determine whether the challenged Chicago Teachers Union procedure survives First Amendment scrutiny * * * because the subsequent adoption of an escrow arrangement **cured *any* constitutional defect**.
>
> * * * *
>
> Although the Union's self-imposed [escrow] remedy eliminates [one of the defects,] the risk that nonunion employees' contributions may be temporarily **used** for impermissible purposes, the procedure **remains flawed in *two* respects**. It does not provide an **adequate explanation** for the advance reduction of dues, and it does not provide a reasonably prompt decision by an impartial decisionmaker.
>
> * * * *
>
> Thus, the Union's 100% escrow **does not cure all of the problems** in the original procedure. Two of the three flaws remain, and the procedure therefore continues to **provide less than the Constitution requires** in this context.

Had this Court been concerned **only** with misspending, as the court of appeal and dissent in *Grunwald* concluded, then it would have required only the post-deprivation protections of 100% escrow and prompt review of the union's calculation of the fee amount by an impartial decisionmaker, which eliminates the risk of the union's misuse of the nonmembers monies. *Hudson*, 475 U.S. at 309.

However, this Court, like the Seventh Circuit before it,[10] required more. As previously noted, it also held "that the constitutional requirements for the Union's **collection** of agency fees" included **pre**-deprivation protections: the adequate explanation and justification of the amount of the fees to be collected.[11] In fact, *Hudson* held that the **collection procedure in that case was unconstitutional even with a 100% escrow.** Thus, when agency fees are collected, whether excessive or not, and even if paid into escrow, **but any of the other First Amendment due process safeguards prescribed in *Hudson* are absent**, like advance notice, the constitutional rights of nonmembers are violated.

While escrow cures the misspending violations, it cannot cure the collection violations. Only the advance notice of the impending fee seizures can prevent an illegal collection. Therefore, notice of the "collection of agency fees," not the availability of a post-seizure method to recover those fees which never should have been taken in the first place, is the critical notice. And escrow neither provides that advance notice nor cures the problem.

Accordingly, due process, basic fairness and the First Amendment all require this pre-deprivation notice, which the Seventh Circuit called "fair notice." *Hudson*, 743 F.2d at 1196. Thus, the regulations' concurrent notice option continues to provide less than the Constitution requires.

---

[10]"The question here is whether the [nonunion employees] have a federal right to challenge a procedure that may not have resulted in any improper expenditures—whether, in other words, even if the union has **not used** any of the money it has collected from objecting employees * * *, [these employees] can still complain that they have been **deprived** of the liberty secured them by the Constitution. **We think they can** * * *." *Hudson v. Chicago Teachers Union*, 743 F.2d 1187, 1192 (7th Cir. 1984), *aff'd*, 475 U.S. 292 (1986)(emphasis added).

[11]*Hudson*, 475 U.S. at 310; *see also id.* at 306-07, 309 (emphasis added); *see also Grunwald*, 917 F.2d at 1227-30; *Tierney v. City of Toledo*, 824 F.2d 1497, 1502-03 (6th Cir. 1987).

B. The Conflict With the Courts of Appeals

The court of appeal decision upholding the concurrent notice regulation also conflicts with every decision of the United States court of appeals which have decided this issue, *i.e.*, the First, Fourth, Sixth and Ninth Circuits. The **Ninth Circuit** in *Grunwald*, following the **Sixth Circuit**'s decision in *Tierney v. City of Toledo*, 824 F.2d 1497, 1503, 1506 (6th Cir. 1987), based the necessity of advance notice on the "adequate explanation" requirement of *Hudson*.[12]

> *Tierney* required unions to give notice before any fees are deducted in order to fulfill *Hudson*'s * * * requirement of providing nonmembers with adequate information to contest the fee. Advance notice must be given to protect the nonmember's first amendment interest—a fair opportunity to identify the impact of the government action on his interests and assert a meritorious first amendment claim.
>
> We agree with *Tierney* and hold that notice of and adequate information concerning the agency fee must be given to all nonmembers ***before*** any fees may be collected from them.

Grunwald, 917 F.2d at 1228 (emphasis in original) (citations omitted). [13]

---

[12]Previously, the Ninth Circuit had based advance notice on procedural due process. "Due process requires reasonable notice to parties **before** action is taken to **deprive** them of **property**." *Zmuda v. Commissioner of Internal Revenue*, 731 F.2d 1417, 1419 (9th Cir. 1984) (emphasis added).

[13]Subsequently, the Ninth Circuit again found that *Hudson* held "that **before collecting fees** through an agency shop agreement, a union must adequately **explain** the basis for the fee * * * [or] the union has no right to enforce an agency shop agreement." *Dean v. TWA*, 924 F.2d 805, 808-09 (9th Cir. 1991) (emphasis added).

It is not surprising that the court of appeal was unable to provide any case citations, other than the **dissent** in *Grunwald*, to support the constitutionality of a concurrent notice. Since every reported federal decision has rejected this type of "ex post facto" approach to the constitutionally required notice, **no** supporting authority exists.

In Dashiell v. Montgomery County, 925 F.2d 750, 754, 756 (4th Cir. 1991) (emphasis added), the **Fourth Circuit** ruled "the union must * * * provid[e] the employee **advance information** about the fee **to be** charged * * * [and] follow required procedures in **advance of assessing a fee.**"

Similarly, the **Sixth Circuit** held: "*Hudson* admonishes the union to give '**potential objectors** * * * sufficient information to gauge the propriety of the union's fee,' **before it collects** any fees from non-members * * * *Hudson*[ ] require[s] that detailed financial information concerning all major categories of union expenses * * * be * * * provided to all non-members **before** any fees may be **collected** from them." *Tierney*, 824 F.2d at 1503, 1506 (first emphasis in original, other emphasis added)(citations omitted).[14]

---

[14]Following *Hudson* and *Tierney*, a district court acknowledged "the notice and opportunity to object must occur **prior to the deduction** of any fair share fees." *Lowary v. Lexington Local Bd.*, 704 F. Supp. 1430, 1447 (N.D. Ohio 1987) (emphasis added).

Meanwhile, two district courts in the **Seventh Circuit** have also ruled on the advance notice issue. *Dixon v. City of Chicago*, 669 F. Supp. 851, 852 (N.D. Ill. 1987) ("a public employer may collect fees on behalf of a union only if the union has provided 'an adequate explanation for the basis of the fee * * * '"); *Gilpin v. AFSCME*, 643 F. Supp. 733, 737 (C.D. Ill. 1986) (emphasis added) ("adequate notice requires notification a sufficient time **prior to the deprivation** so as not to present the deprived party with a *fait accompli*").

In a case involving mandatory bar dues,[15] the **First Circuit** in *Schneider v. Colegio de Abogados de Puerto Rico*, 917 F.2d 620, 634, 635 n.22 (1st Cir. 1990), held that it is the bar association's "obligation at the outset of a dues year to categorize its activities * * * [and] provide members at the beginning of the dues year with a proposed budget that classifies activities as appropriate or inappropriate for mandatory financing."

Even before *Hudson*, the **Third Circuit** in *Galda v. Bloustein*, 686 F.2d 159, 168 n.16 (3d Cir. 1982), found that the start of deductions discourages challenges. The Third Circuit quoted and relied on the recommendation of *The Supreme Court, 1976 Term*, 91 Harv. L. Rev. 1, 198 (1977) (emphasis added), that on the basis of *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977), unions should be required to make a schedule of estimated yearly disbursements available for inspection "**before** collecting fees from nonunion members," because there "will thus be more assurance that inertia will not persuade a dissenter to relinquish his constitutionally protected right to freedom of association."

As recognized by the Ninth Circuit, but ignored by the California Court of Appeal, this Court in *Hudson* required procedural safeguards not only to prevent misspending, but also to give the nonmember "a fair opportunity to identify the impact of the governmental action on his interests and to assert a meritorious First Amendment claim." *Hudson*, 475 U.S. at 303; *accord Grunwald*, 917 F.2d at 1228. Since "the governmental action on his interests" occurs when the public employer automatically deducts the fees, the notice and opportunity to object must occur prior to the seizure of the nonmembers' fees.

---

[15] "We believe an integrated bar could certainly meet its *Abood* obligation by adopting the sort of procedures described in *Hudson*." *Keller v. State Bar*, __ U.S. __, __, 110 S. Ct. 2228, 2237 (1990).

CONCLUSION

As shown above, the fundamental First Amendment due process right of notice prior to the deprivation of one's property is well settled. This right of advance notice has been consistently and specifically applied by this Court and the federal courts of appeals to the compulsory seizure of union fees from nonmembers. The facts here are not in dispute. The decision below is **clearly** in error, and without any support other than the *Grunwald* **dissent**. Therefore, this Court is urged to grant the petition for certiorari. It may also wish to consider summary reversal of this clearly erroneous judgment of the California Court of Appeal which denied a fundamental First Amendment due process right. Supreme Court Rule 16.1; *cf. Mireles v. Waco*, __ U.S. __, 112 S. Ct. 286 (1991); *see also* Stern, Gressman & Shapiro, Supreme Court Practice 280-81, 286 (6th ed. 1986).

Respectfully submitted,

MILTON L. CHAPPELL, Esq.
c/o National Right to Work Legal
Defense Foundation, Inc.
8001 Braddock Rd., Suite 600
Springfield, Virginia 22160
Telephone: 1-703-321-8510

Counsel of Record for Petitioners

DATED: April 1992

APPENDICES

APPENDIX A

DECISION OF THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

October 29, 1991

NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

JANICE J. JERABEK et al.,	Civil C009380
Plaintiffs and Respondents,	(Super.Ct.No. 507208)
v.	**[Clerk's stamp, dated Oct. 29, 1991, omitted in printing]**
STATE OF CALIFORNIA, PUBLIC EMPLOYMENT RELATIONS BOARD,	
Defendant,	
AFL-CIO et al.,	
Intervenors and Appellants.	

Plaintiffs are teachers who do not belong to their employee organization but pay an agency fee in lieu of dues.[1] They filed suit for declaratory and injunctive relief against the Public Employment Relations Board (PERB), asserting promulgated regulations relating to the collection of agency fees violated constitutional safeguards enunciated in Chicago Teachers Union

---

[1]For ease of reference, the terms "employee organization," "exclusive bargaining representative," and "union" are used interchangeably in our opinion.

v. Hudson (1986) 475 U.S. 292 [89 L.Ed.2d 232] (hereinafter referred to as "Hudson"). The trial court upheld most of the regulations but found portions of two regulations unconstitutional. Those regulations authorize the union to provide notice outlining the basis for the agency fee concurrently with the first agency fee collection, provided all of the collected fees are placed into escrow until any objectors are identified. (Cal. Code Regs., tit. 8, § 32992, subd. (c)(2); § 32995, subd. (a)(2).) On appeal, intervenors assert the two challenged provisions pass constitutional muster. We agree and shall reverse.

GENERAL PRINCIPLES

To place the intervenors' claims in context, initially we outline the relevant statutes and case law.

A. California statutes

The Ralph C. Dills Act (Gov. Code, § 3512 et seq.) governs labor relations for California state employees. Among its provisions is Government Code section 3515.7, which authorizes an exclusive bargaining representative to enter into an agreement with the state employer providing for "organizational security in the form of maintenance of membership or fair share fee deduction." "Organizational security" includes "[a]n arrangement that requires an employee, as a condition of continued employment, either to join the recognized or certified employee organization, or to pay the organization a service fee in an amount not to exceed the standard initiation fee, periodic dues, and general assessments of the organization . . . ." (Gov. Code, § 3540.1, subd. (i)(2).)

Government Code section 3513, subdivision (k) defines "fair share fee" as "the fee deducted by the state employer from the salary or wages of a state employee in an appropriate unit who does not become a member of and financially support the recognized employee organization. The fair share fee shall be used to defray the costs incurred by the recognized employee

organization in fulfilling its duty to represent the employees in their employment relations with the state, . . . "

California statutes also recognize the right of a nonmember employee to be free from compulsory subsidization of activities unrelated to the conditions of employment or the collective bargaining process. Government Code section 3515.8 provides: "Any state employee who pays a fair share fee shall have the right to demand and receive from the recognized employee organization, under procedures established by the recognized employee organization, a return of any part of that fee paid by him or her which represents the employee's additional pro rata share of expenditures by the recognized employee organization that is either in aid of activities or causes of a partisan political or ideological nature only incidentally related to the terms and conditions of employment, or applied towards the cost of any other benefits available only to members of the recognized employee organization. The pro rata share subject to refund shall not reflect, however, the costs of support of lobbying activities designed to foster policy goals and collective negotiations and contract administration, or to secure for the employees represented advantages in wages, hours, and other conditions of employment in addition to those secured through meeting and conferring with the state employer. The board [PERB] may compel the recognized employee organization to return that portion of a fair share fee which the board may determine to be subject to refund under the provisions of this section."

B. United States Supreme Court cases

On numerous occasions the Supreme Court has analyzed constitutional concerns presented in agency fee cases. We recently recapitulated these cases in Lillebo v. Davis (1990) 222 Cal.App.3d 1421, 1430-1438. Rather than repeating that summary here, we briefly mention only two cases of particular significance to the matter before us.

In Abood v. Detroit Board of Education (1977) 431 U.S. 209 [52 L.Ed.2d 261], the Supreme Court upheld agency fee systems

in which employees who are not members of the exclusive bargaining representative are required to pay a fair share of the union's cost of negotiating and administering a collective bargaining agreement. (Id. at p. 232.) This system is designed to prevent the problems associated with "free riders," those who "refuse to contribute to the union while obtaining benefits of union representation that necessarily accrue to all employees." (Id. at p. 222.)

The Abood court also recognized that nonmember employees have a constitutional right to "prevent the Union's spending a part of their required service fees to contribute to political candidates and to express political views unrelated to its duties as exclusive bargaining representative." (Id. at p. 234.) While the nonmember employee has the burden of raising an objection to the agency fee, the union bears the burden of proving the validity of the assessment. (Id. at pp. 239-241, and fn. 40, pp. 239-240.) Agency fee procedures must be designed to prevent "compulsory subsidization of ideological activity by employees who object thereto without restricting the Union's ability to require every employee to contribute to the cost of collective-bargaining activities." (Id. at p. 237.)

In Hudson, supra, 475 U.S. 292, the court outlined the procedural safeguards required to achieve this objective and promulgated a three-part test to be met in collecting agency fees from nonmembers. There must be (1) adequate explanation of the basis for the fee, (2) a reasonably prompt opportunity to challenge the amount of the fee before an impartial decision maker, and (3) an escrow for the amounts reasonably in dispute while a challenge is pending. (Id. at p. 310.)

PROCEDURAL BACKGROUND

To meet the concerns outlined in Hudson, PERB promulgated a series of regulations relating to the collection of agency fees. These regulations became operative April 1, 1989, and form Title 8, Division 3, Chapter 1, Subchapter 8 of the California Code of Regulations. Section 32992, "Notification of Nonmember,"

requires the exclusive representative to send to each nonmember required to pay an agency fee a statement outlining the amount of agency fee, the basis for its calculation, and a procedure for appealing all or part of the fee. (§ 32992, subd. (a).) The calculations are to be based on an independent audit that is to be made available to the nonmembers. (§ 32992, subd. (b).)

Subdivision (c), whose constitutionality is at issue in this appeal, provides: "Such written notice shall be sent/distributed to the nonmember either: [¶] (1) At least 30 days prior to collection of the agency fee, after which the exclusive representative shall place those fees subject to objection in escrow, pursuant to Section 32995 of these regulations; or [¶] (2) Concurrent with the initial agency fee collection, provided however, that all agency fees so noticed shall be held in escrow in toto until all objectors are identified. Thereafter, only the agency fees for agency fee objectors shall be held in escrow, pursuant to Section 32995 of these regulations." (Emphasis added.)

Section 32995, "Escrow of Agency Fees in Dispute," provides: "(a) The exclusive representative shall open an account in any independent financial institution in which to place in escrow either: [¶] (1) Agency fees to be collected from nonmembers who have filed timely agency fee objections . . .; or [¶] (2) Agency fees collected from nonmembers receiving concurrent notice with the initial agency fee collection as provided in Section 32992(c) (2) of these regulations." (Emphasis added.) Subdivision (b) of this regulation establishes the procedures for releasing challenged agency fees from escrow. Subdivision (c) provides: "Interest at the prevailing rate shall be paid by the exclusive representative on all rebated fees."

Plaintiffs filed a complaint in superior court asserting inter alia these regulations did not comport with Hudson. PERB filed an answer disputing plaintiffs' claims. Intervenors, labor organizations representing thousands of employees, received permission to intervene in the action. Cross motions for summary judgment and summary adjudication of issues were filed, with plaintiffs' seeking a declaration that the challenged regulations were

unconstitutional and PERB and intervenors seeking a declaration of constitutionality.

The trial court rejected most of the challenges to the regulations but found the "concurrent notice with escrow" provisions to be unconstitutional, noting: "The 100 percent escrow contained in the proposed regulations does not prevent the employee from being deprived [of] the use of a portion of the employee's earnings prior to being given an opportunity to be heard on any objection." The court declared unconstitutional section 32992, subdivision (c) (2) and section 32995, subdivision (a)(2), the two sections authorizing concurrent notice with escrow procedures. Intervenors appeal from the ensuing judgment.[2]

DISCUSSION

The sole issue presented in this appeal is one of law, whether the concurrent notice provisions of the adopted regulations comport with Hudson requirements. We conclude they do.

In Hudson, the court reviewed the union's agency fee procedures to determine whether they met the objective previously enunciated in Abood: a "'way of preventing compulsory subsidization of ideological activity by employees who object thereto without restricting the Union's ability to require every employee to contribute to the cost of collective-bargaining activities.'" (Abood, supra, 431 U.S. at p. 237; Hudson, supra, 475 U.S. at p. 302.)

Previously, in Ellis v. Railway Clerks (1984) 466 U.S. 435, the Supreme Court determined that a pure rebate approach did not meet Abood's requirements. "By exacting and using full dues, then refunding months later the portion that it was not allowed to exact in the first place, the union effectively charges the employees for activities that are outside the scope of the statutory authorization. . . . [T]he union obtains an involuntary

---

[2]PERB is not a party to this appeal.

loan for purposes to which the employee objects." (Id. at p. 444.) The court noted: "The only justification for this union borrowing would be administrative convenience. But there are readily available alternatives, such as advance reduction of dues and/or interest-bearing escrow accounts, that place only the slightest additional burden, if any, on the union. Given the existence of acceptable alternatives, the union cannot be allowed to commit dissenters' funds to improper uses even temporarily." (Emphasis added; ibid.)

In reviewing the agency fee procedures in place in Hudson, the Supreme Court found three "fundamental flaws." (Hudson, supra, 475 U.S. at pp. 304-305.) First, the procedures called for a rebate system similar to that condemned in Ellis, permitting the dissenters' funds to be used temporarily for improper purposes. (Id. at pp. 305-306.) Second, nonmembers were given inadequate information concerning the basis for the agency fee amount in that the union failed to explain the expenditures for collective bargaining and contract administration. (Id. at pp. 306-307.) Finally, the court found the union's procedure defective because it did not provide for a reasonably prompt decision by an impartial decisionmaker. (Id. at pp. 307-308.)

The court then examined procedures since instituted by the union in which 100 percent of the agency fee contributions were placed into escrow. The court noted: "Although the Union's self-imposed remedy eliminates the risk that nonunion employees' contributions may be temporarily used for impermissible purposes, the procedure remains flawed in two respects. It does not provide an adequate explanation for the advance reduction of dues, and it does not provide a reasonably prompt decision by an impartial decisionmaker." (Id. at p. 309.)

The court continued: "We need not hold, however, that a 100% escrow is constitutionally required. Such a remedy has the serious defect of depriving the Union of access to some escrowed funds that it is unquestionably entitled to retain. If, for example, the original disclosure by the Union had included a certified public accountant's verified breakdown of expenditures, including

some categories that no dissenter could reasonably challenge, there would be no reason to escrow the portion of the nonmember's fees that would be represented by those categories. On the record before us, there is no reason to believe that anything approaching a 100% 'cushion' to cover the possibility of mathematical errors would be constitutionally required." (Id. at p. 310, fn. omitted.)

Because two of the three flaws remained even with the 100 percent escrow, the court ruled the union's agency fee procedures did not provide the necessary constitutional protections. (Ibid.) The court concluded "the constitutional requirements for the Union's collection of agency fees include an adequate explanation of the basis for the fee, a reasonably prompt opportunity to challenge the amount of the fee before an impartial decisionmaker, and an escrow for the amounts reasonably in dispute while such challenges are pending." (Ibid.)

The applications of Hudson to the Educational Employment Relations Act (EERA) was discussed in Cumero v. Public Employment Relations Bd. (1989) 49 Cal.3d 575. In that case, our Supreme Court stated, "The fact that an expenditure of the union is for a purpose beyond its representational obligations and therefore not properly chargeable to nonmember service fees by no means precludes the expenditure altogether. The expenditure may well be an appropriate use of union funds received from members in the form of fees, dues, or assessments. If so, it may also be financed out of service fees paid by nonmembers who are sufficiently informed of the proposed expenditure and are given an opportunity to object, yet fail to do so." (Id. at pp. 589-590.)

The court found the procedures outlined in Hudson to be "sufficient and appropriate for protection of nonmember employees' statutory rights to prevent improper use of their service fees collected under an EERA organizational security arrangement." (Id. at p. 590.) The court concluded: "[E]ach nonmember has a right to prevent the use of his or her service fee for purposes beyond the union's representational obligations. [This right] must be affirmatively asserted or else it is waived.

Accordingly, that right is satisfied if the nonmember is given sufficient information about union expenditures, an opportunity to challenge the amount of his or her financial obligation to the union before an impartial decisionmaker, and protection in the form of an escrow of amounts reasonably in dispute while such challenges are pending, all in accordance with [Hudson.]" (Ibid.)

The regulations at issue here comport with the requirements of Hudson and Cumero. Any funds collected under the concurrent notice provision of section 32992, subdivision (c) (2) are placed in an escrow account pending objection by nonmembers. At no time does the union have access to these funds to use them for political, ideological, or other nonrepresentational purposes. Consequently, the evil discussed in Abood, Ellis, and Hudson, the involuntary subsidization of ideological activity, is not implicated. The funds are placed in escrow, not used for impermissible purposes.[3]

Some lower federal courts have reached the same conclusion. In Hohe v. Casey (3rd Cir. 1989) 868 F.2d 69, the court held: "The First Amendment interest protected by Hudson's requirements is the nonmembers' 'interest in not being compelled to subsidize the propagation of political or ideological views that they oppose.' [Citations.] Since the Union has escrowed the entire amount of all fair share fees deducted, from non-challengers as well as challengers, until disposition of the challenges by an impartial arbitrator, this interest is protected." (Id. at p. 72.)

Several lower federal courts have faced a similar problem in a slightly different context involving "advanced reduction," in which the courts have considered whether the union must initially reduce the charged agency fee by an amount reflecting nonrepre-

---

[3]At oral argument, plaintiffs cited two recent federal cases, Dean v. TWA (9th Cir. 1991) 924 F.2d 805 and Dashiell v. Montgomery County, Md. (4th Cir. 1991) 925 F.2d 750. These cases are of minimal relevance as they focus on the problems associated with involuntary subsidies of union activities, a problem that is averted in the instant case by the use of an escrow account.

sentational expenses, or whether the union can charge an agency fee in an amount equal to 100 percent of dues provided the collected fees are placed in escrow pending objection of non-members.[4] In Crawford v. Air Line Pilots Ass'n Intern. (4th Cir. 1989) 870 F.2d 155, the union did not provide for advance reduction of agency fees, but placed 150 percent of its estimated rebate obligation into an interest-bearing escrow account. The court noted Ellis, supra, 466 U.S. at page 444 held that either "'advance reduction of dues and/or interest-bearing escrow accounts' are acceptable." The Crawford court concluded Hudson did not "expressly or impliedly overrule Ellis with respect to providing an interest-bearing escrow account as an alternative to advance reduction," and rejected the claim that the union's procedures were unconstitutional. (870 F.2d at p. 161.)

An identical conclusion was reached in Gibson v. The Florida Bar (11th Cir. 1990) 906 F.2d 624, a case in which the United States Supreme Court has granted certiorari. In Gibson, the court held Ellis and Hudson provide "indisputable authority" that an interest-bearing escrow account adequately protects the First Amendment rights of agency fee payers. (Id. at p. 631.)

Other courts have reached contrary results. In Tierney v. City of Toledo (1987) 824 F.2d 1497 and Damiano v. Matish (1987) 830 F.2d 1363, the Sixth Circuit concluded the failure to provide advance reduction of dues violated Hudson: "In our view, Hudson shows the Supreme Court's intention that, upon a non-member's objection, the union should not deduct any amount, for however short a time, which represents monies clearly expended for ideological purposes. The union simply cannot exact from the dissenter this proportionate amount, and must allow him an advance reduction of that part of the union's fee immediately upon objection. We therefore believe that the Supreme Court's approval of 100% escrow as satisfying Hudson's

---

[4]We reiterate that the only issue before us in this case is the constitutionality of the concurrent notice provisions of the promulgated regulations. We have no occasion to determine the amount of agency fees a union may properly collect.

first requirement refers to escrowing 100% of the remaining, non-clearly ideological proportion of the fee which the union may collect." (Tierney, supra, 824 F.2d at p. 1504.) The Tierney court did not attempt to reconcile this conclusion with the language in Ellis authorizing advance reduction "and/or interest-bearing escrow accounts." (See Gillespie v. Willard City Bd. of Educ. (N.D. Ohio 1987) 700 F.Supp. 898, 903-904.)

In Damiano, supra, 830 F.2d 1363, the 6th Circuit followed the reasoning of Tierney, further explaining that "because First Amendment rights are implicated, the method of calculating service fees for objecting employees adopted by the union must be narrowly drawn so as to 'minimize both the impingement [upon the objectors' constitutional rights] and the burden [upon the exercise of those rights].' [Citations.]" (Id. at p. 1369.) The court found the advanced reduction method to be "clearly a less burdensome method of accommodating non-union employees who do not wish to have service fees used for purposes other than collective bargaining," (ibid.) and held "that once a non-union employee properly objects to the use of agency fees, the union is constitutionally required to calculate the service fees of such an employee using the advanced reduction method." (Id. at pp. 1369-1370.)

The Ninth Circuit recently followed Tierney in Grunwald v. San Bernardino City School Dist. (9th Cir. 1990) 917 F.2d 1223.) However, the court has deferred a ruling on a petition for rehearing en banc in that case pending the Supreme Court's decision in Gibson, supra. In Grunwald, the court held in a divided opinion that Hudson requires the union to deduct "only the amount it is entitled to, i.e., the amount arguably related to its collective bargaining expenses." (Id. at p. 1228.) The court concluded the union "must first determine the percentage of union expenses spent on activities unrelated to collective bargaining and then calculate the advance reduction from the nonmembers' dues before it can make any deductions." (Ibid.)

In dissent, Judge Kozinski noted that none of the dissenters' money was used for nonrepresentational activities because it had

all been placed in an escrow account. "Here, the union uses not a penny for nonrepresentational activities, as 100% of the agency fee is safely tucked away in escrow. Thus, objecting employees do not suffer the injustice of having their money used to advance causes they abhor." (Grunwald, 917 F.2d at p. 1231, fn. omitted.) The dissent noted: "The Court's concern in Hudson about use of the money for prohibited purposes is not relevant here; no legitimate first amendment interest is violated by the temporary collection of the money. Any due process concern is satisfied by the fact that there is an accounting, the opportunity to have the matter resolved by an impartial arbitrator, and the payment of interest (or its equivalent, an advance rebate) to make up for any lost use of the funds." (Original emphasis; ibid.)

We agree. The regulations at issue here protect the First Amendment rights of agency fee payers. As all of their collected funds are placed into an escrow account, the union cannot use this money for an impermissible purpose.

Plaintiffs' assert that concurrent collection of agency fees results in the loss of use of their money, thereby implicating their First Amendment right to use their money for purposes of their own choosing. We quote Judge Kozinski's reply to an identical contention: "If this argument were accepted, every suit for money against a party acting under color of government authority would automatically become a first amendment case. In any event, it is a type of harm that the Court in Hudson did not recognize." (Grunwald, supra, 917 F.2d at p. 1231, dis. opn. of Kozinski, J.) Judge Kozinski discounted dictum in Seay v. McDonnell Douglas Corp. (9th Cir. 1970) 427 F.2d 996, 1004 that would seem to support plaintiff's claim: "[I]n the two decades that it has been on the books, the Seay dictum has never been followed; any precedential effect it may have had has surely been dissipated by the Supreme Court's intervening ruling in Hudson." (Id. at p. 1231, fn. 3.)

We find unpersuasive plaintiff's claim that because the First Amendment requires narrowly drawn procedures, only advance notice of agency fees can be found constitutional. As one court

explained: "[W]e do not believe that Hudson stands for the proposition that a union's procedures are constitutionally infirm unless they constitute the least restrictive process imaginable. When the union's plan satisfies the standards established by Hudson, the plan should be upheld even if its opponents can put forth some plausible alternative less restrictive of their right not to be coerced to contribute funds to support political activities that they do not wish to support." (Andrews v. Education Ass'n of Cheshire (2nd Cir. 1987) 829 F.2d 335, 340.)

DISPOSITION

We conclude the "concurrent notice with escrow" provisions of sections 32992, subdivision (c) (2) and 32995, subdivision (a) (2) comport with Hudson and adequately protect the First Amendment and due process rights of agency fee payers. The judgment is reversed, intervenors to recover costs on appeal.

CARR, Acting P.J.

We concur:

SCOTLAND, J.

NICHOLSON, J.

APPENDIX B

DECISION OF THE SUPERIOR COURT OF THE STATE OF CALIFORNIA

March 26, 1990

[Clerk's stamp, dated Mar. 26, 1990, omitted in printing]

IN THE SUPERIOR COURT
OF THE STATE OF CALIFORNIA

IN AND FOR THE COUNTY OF SACRAMENTO

JANICE J. JOHNSON, JEANNE MAHAN, and DIANNE FOSTER, Plaintiffs, vs. STATE OF CALIFORNIA PUBLIC EMPLOYMENT RELATIONS BOARD, Defendant, AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS; SERVICE EMPLOYEES INTERNATIONAL UNION; AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES; CALIFORNIA TEACHERS ASSOCIATION; CALIFORNIA SCHOOL EMPLOYEES ASSOCIATION, Interveners.	NO. 507208 DEPT. 28 DECISION ON MOTION FOR SUMMARY JUDGMENT AND SUMMARY ADJUDICATION OF ISSUES

The parties have asked for a declaration of whether the agency fee regulations (Title 8, California Code of Regulations sections 32990 - 32997) are constitutional. The Court finds that there are portions of the regulations which are void, and thus will issue a summary judgment in declaratory relief.

This is not a case, such as in Hudson, where the Court is ruling on the validity of a contract between a union and an employer. This case involves a facial attack upon the regulations, which are a legislative product. The Court must, therefore, interpret the regulations and review what they say, and must make every effort to interpret the regulations in a manner consistent with constitutionality, if possible.

PERB is not required to produce regulations which mandate that the agency fee issue be handled in only one way. The Court cannot, therefore, substitute its judgment for that of the agency. The Court is not, however, bound by the arguments of the agency as to what the regulations say. The assumptions of the parties as to the interpretation of the regulations has unnecessarily complicated this matter.

The parties have somehow equated the term "agency fee" with the deductions for dues and assessments for union members. Much of the argument of all of the parties is directed to the question of whether the employer may deduct from the wages of non-members an amount equal to the amount deducted from union members, with the non-member being required to object to the full deduction or waive the right to claim a refund for the amounts over the "fair share" fee. This is not the issue presented by the regulations.

The regulations do not define what an agency fee is with any great particularity, but there are some statements which are pertinent. The first, and the one which has probably sowed the confusion, is Section 32991. This Section sets maximum on the agency fee equal to the amounts which members of the union pay. This merely prevents the union from having non-members subsidize the members. It is consistent with the holding in

Cumero. The second, and the one which has not been discussed in the briefs, is Section 32992(a) (1). In that Section, the agency fee is to be calculated as a percentage of the annual dues per member "based on the chargeable expenditures" identified in the notice. The term "chargeable expenditures" is not defined in the regulations. The Supreme Court of California, in Cumero, repeatedly used that term to indicate the expenditures by the union which were mandated by EERA as necessary for the union to discharge its representational duties. Chargeable expenditures would only equal the full amount of dues paid by union members in the rare instance where the union's sole activities consisted of nothing more than that. If any of the activities of the union would be non-chargeable, the regulation requires that the pro rata share of these amounts be deducted before the "agency fee" can be calculated. All of the arguments about whether the union and the employer may deduct a full dues charge and make the non-member object to get it back are not relevant. This aspect of the regulations, therefore, is not subject to successful constitutional attack.

Plaintiffs have also challenged the notice provisions of Section 32992. The regulation's allowance of notice concurrent with collection of compulsory fee deductions is in violation of the Constitution and cannot stand.

First Amendment due process requires that governmental entities use means ". . . least restrictive of freedom of belief and association." (Hudson 303.) "The First Amendment requires that the procedure be carefully tailored to minimize the infringement" on the nonunion employees' constitutional rights. (Id. at 302, 303.) The Court, as required by Judson, Abood, and Breaux, must balance the infringement on the rights of the objecting employees against the restriction on the union's ability to require every employee to contribute to the cost of collective bargaining activities. The intervenors correctly point out that it would be improper for the Court to "hamstring the union". The Court must also consider the interests of the employer in labor peace and stability, which is furthered by collective bargaining.

The nonmember employee is obviously affected by the concurrent notice procedure proposed. The 100 percent escrow contained in the proposed regulations does not prevent the employee from being deprived on the use of a portion of the employee's earnings prior to being given an opportunity to be heard on any objection. On the other hand, intervenor's argument that the union or the employer's rights in requiring every employee to contribute to the cost of collective bargaining would be impaired is not convincing. The problems raised about the employer's having to deduct differing amounts from different employees appear to be inconveniences, not barriers. The regulations already contemplate that different amounts from union members and fair share employees will be withheld.

The Court, therefore, declares the following portions of the regulations to be void: Section 329929 (c) (2) and Section 32995 (a) (2).

The challenge by plaintiffs to the regulations based on the alleged failure to provide for an independent audit of the allocation of chargeable expenses fails, because the Court would have to assume that the independent audit called for in the regulations would somehow be inadequate. At this time, we must assume that the audit will comply with the due process requirements of the Constitution. We cannot assume that the agency will interpret or enforce the regulation in any other way.

The plaintiffs' challenge in the complaint to the manner of selection of an impartial decision maker was not addressed in plaintiffs' motion and is considered abandoned. Defendants are entitled to summary adjudication of issues on this point.

The Court also considers abandoned for the same reason the challenge to the exhaustion of internal remedies requirement, and the timing of release of escrowed funds. Defendants are also entitled to summary adjudication of issues on these sections.

The parties agreed at oral argument that plaintiffs' requests for injunctive relief are subsumed by the declaratory relief

decision, and thus that summary judgment by a declaration of rights is proper.

Plaintiffs are directed to prepare the orders and submit the proposed form thereof to all parties for approval as to form.

DATED: MAR 26 1990

JOE S. GRAY
JUDGE OF THE SUPERIOR COURT

APPENDIX C

DENIAL OF PETITION FOR REVIEW FILED BY THE SUPREME COURT OF THE STATE OF CALIFORNIA

January 30, 1992

Third Appellate District No. C009380
S023876

IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA

IN BANK

[Clerk's stamp, dated Jan. 30, 1992, omitted in printing]

JANICE J. JERABEK Et Al., Respondents

v.

CALIFORNIA PUBLIC EMPLOYMENT
RELATIONS BOARD

A F L - C I O Et Al., Appellants

Respondents' petition for review DENIED.

On the recommendation of the Court of Appeal pursuant to Rule 978 of the California Rules of Court, the Reporter of Decisions is directed to publish the opinion in the above entitled case in the Official Reports. See Subdivision (c) of Rule 978, California Rules of Court.

BAXTER
Acting Chief Justice

APPENDIX D

CALIFORNIA PUBLIC EMPLOYMENT RELATIONS BOARD'S AGENCY FEE REGULATIONS, CAL. CODE REGS. TIT. 8, §§ 32990-32997

1989

Subchapter 8. Agency Fee Regulations

§ 32990. Agency Fee Agreements.

Pursuant to Government Code Sections 3515.7 and 3540.1, an exclusive representative may enter into an agreement with an employer which provides for the "fair share" or "agency shop" form of organizational security (hereinafter known as "agency fee"). All such agency fee agreements shall be administered in accordance with the following regulations.

NOTE: Authority cited: Sections 3513(g), 3541.3(g), (i) and (n), Government Code. Reference: Sections 3515.7 and 3540.1(i), Government Code; and Chicago Teachers Union, Local No. 1 v. Hudson (1986) 475 U.S. 292.

HISTORY

1. New section filed 3-2-89; operative 4-1-89 (Register 89, No. 12).

§ 32991. Amount of Agency Fee.

The agency fee shall not exceed the amounts set forth in Government Code Sections 3513(j) and 3540.1(i)(2).

NOTE: Authority cited: Sections 3513(g) and 3541.3(g), Government Code. Reference: Sections 3513(j) and 3540.1(i), Government Code; and Chicago Teachers Union, Local No. 1 v. Hudson (1986) 475 U.S. 292.

HISTORY

1. New section filed 3-2-89; operative 4-1-89 (Register 89, No. 12).

§ 32992. Notification of Nonmember.

(a) Each nonmember who will be required to pay an agency fee shall annually receive written notice from the exclusive representative of:

(1) The amount of the agency fee which is to be expressed as a percentage of the annual dues per member based upon the chargeable expenditures identified in the notice;

(2) The basis for the calculation of the agency fee; and

(3) A procedure for appealing all or any part of the agency fee.

(b) All such calculations shall be made on the basis of an independent audit that shall be made available to the nonmember.

(c) Such written notice shall be sent/distributed to the nonmember either:

(1) At least 30 days prior to collection of the agency fee, after which the exclusive representative shall place those fees subject to objection in escrow, pursuant to Section 32995 of these regulations; or

(2) Concurrent with the initial agency fee collection, provided however, that all agency fees so noticed shall be held in escrow in toto until all objectors are identified. Thereafter, only the agency fees for agency fee objectors shall be held in escrow, pursuant to Section 32995 of these regulations.

NOTE: Authority cited: Sections 3513(g) and 3541.3(g), Government Code. Reference: Sections 3515.7 and 3540.1(i), Government Code; and Chicago Teachers Union, Local No. 1 v. Hudson (1986) 475 U.S. 292.

HISTORY

1. New section filed 3-2-89; operative 4-1-89 (Register 89, No. 12).

§ 32993. Filing of Financial Report.

Each exclusive representative that has agreed to an agency fee provision shall, as part of the financial report required by Government Code Sections 3515.7(e) and 3546.5, also include (a) the amount of membership dues and agency fees paid by employees in the bargaining unit covered by the agency fee agreement, and (b) identify the expenditure(s) that constitute(s) the basis for the amount of the agency fee.

NOTE: Authority cited: Sections 3513(g) and 3541.3(g), Government Code. Reference: Sections 3515.7(e) and 3546.5, Government Code; and Chicago Teachers Union, Local No. 1 v. Hudson (1986) 475 U.S. 292.

HISTORY

1. New section filed 3-2-89; operative 4-1-89 (Register 89, No. 12).

§ 32994. Agency Fee Appeal Procedure.

(a) If an agency fee payer disagrees with the exclusive representative's determination of the agency fee amount, that employee (hereinafter known as an "agency fee objector") may file an agency fee objection. Such agency fee objection shall be filed with the exclusive representative. An agency fee objector may file an unfair practice charge that challenges the amount of the agency fee; however, no complaint shall issue until the agency fee objector has first exhausted the exclusive representative's Agency Fee Appeal Procedure. No objector shall be required to exhaust the Agency Fee Appeal Procedure where it is insufficient on its face.

(b) Each exclusive representative that has an agency fee provision shall administer an Agency Fee Appeal Procedure in accordance with the following:

(1) An agency fee objection shall be initiated in writing and shall be filed with an official of the exclusive representative who has authority to resolve agency fee objections.

(2) An agency fee objection shall be filed not later than 30 days following distribution of the notice required under Section 32992 of these regulations.

(3) Within 45 days of the last day for filing an objection under Section 32994(b)(2) of these regulations and upon receipt of the employee's agency fee objection, the exclusive representative shall request a prompt hearing regarding the agency fee before an impartial decisionmaker.

(4) The impartial decisionmaker shall be selected by the Public Employment Relations Board, the American Arbitration Association, or the California State Mediation Service. The selection between these entities shall be made by the exclusive representative.

(5) Any party may make a request for a consolidated hearing of multiple agency fee objections based on case similarities, including but not limited to, hearing location. At any time prior to the start of the hearing, any party may make a motion to the impartial decisionmaker challenging any consolidation of the hearing.

(6) The exclusive representative bears the burden of establishing the reasonableness of the amount of the agency fee.

(7) Agency fee objection hearings shall be fair, informal proceedings conducted in conformance with basic precepts of due process.

(8) All decisions of the agency fee impartial decisionmaker shall be in writing, and shall be rendered no later than 30 days after the close of the hearing.

(9) All hearing costs shall be borne by the exclusive representative, unless the exclusive representative and the agency fee objector agree otherwise.

NOTE: Authority cited: Sections 3513(g) and 3541.3(g), Government Code. Reference: Sections 3515.7 and 3540.1(i), Government Code; and Chicago Teachers Union, Local No. 1 v. Hudson (1986) 475 U.S. 292.

HISTORY

1. New section filed 3-2-89; operative 4-1-89 (Register 89, No. 12).

§ 32995. Escrow of Agency Fees in Dispute.

(a) The exclusive representative shall open an account in any independent financial institution in which to place in escrow either:

(1) Agency fees to be collected from nonmembers who have filed timely agency fee objections pursuant to Section 32994(b)(2) of these regulations; or

(2) Agency fees collected from nonmembers receiving concurrent notice with the initial agency fee collection as provided in Section 32992(c)(2) of these regulations.

(b) Escrowed agency fees that are being challenged shall not be released until after either:

(1) Mutual agreement between the agency fee objector and the exclusive representative has been reached on the proper amount of the agency fee; or

(2) The impartial decisionmaker has made his/her decision, whichever comes first.

(c) Interest at the prevailing rate shall be paid by the exclusive representative on all rebated fees.

NOTE: Authority cited: Sections 3513(g) and 3541.3(g), Government Code. Reference: Sections 3515.7 and 3540.1(i),

Government Code; and Chicago Teachers Union, Local No. 1 v. Hudson (1986) 475 U.S. 292.

HISTORY

1. New section filed 3-2-89; operative 4-1-89 (Register 89, No. 12).

§ 32996. Filing of Agency Fee Appeal Procedure.

An exclusive representative with an agency fee agreement shall file a copy of its Agency Fee Appeal Procedure with the Board within 30 days after entering into an agency fee agreement.
NOTE: Authority cited: Sections 3513(g) and 3541.3(g), Government Code. Reference: Sections 3515.7 and 3540.1(i), Government Code; and Chicago Teachers Union, Local No. 1 v. Hudson (1986) 475 U.S. 292.

HISTORY

1. New section filed 3-2-89; operative 4-1-89 (Register 89, No. 12).
2. Change without regulatory effect of section heading filed 3-20-89; operative 4-1-89 (Register 89, No. 12).

§ 32997. Compliance.

It shall be an unfair practice for an exclusive representative to collect agency fees in violation of these regulations.
NOTE: Authority cited: Sections 3513(g), 3541.3(g) and (i), Government Code. Reference: Sections 3515.7, 3519.5, 3540.1(i), 3542(d), 3543.6 and 3546.5 Government Code; and Chicago Teachers Union, Local No. 1 v. Hudson (1986) 475 U.S. 292.

HISTORY

1. New section filed 3-2-89; operative 4-1-89 (Register 89, No. 12).

(2)

No. 91-1716

Supreme Court, U.S.
FILED
JUN 22 1992
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

JANICE J. JERABEK, JEANNE MAHAN,
DIANNE FOSTER,
Petitioners,

v.

AFL-CIO, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the Court of Appeal of the State of California

---

RESPONDENTS' BRIEF IN OPPOSITION

MARSHA S. BERZON
(Counsel of Record)
177 Post Street
San Francisco, CA 94108
(415) 421-7151

DIANE ROSS
1705 Murchison Drive
Burlingame, CA 94010

LARRY P. WEINBERG
1101 17th Street, N.W.
Washington, D.C. 20036
Counsel for Respondents

JONATHAN P. HIATT
1313 L Street, N.W.
Washington, D.C. 20005

WILLIAM C. HEATH
2045 Lundy Avenue
San Jose, CA 95131

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

12

TABLE OF CONTENTS

	Page
STATEMENT	1
ARGUMENT	3
CONCLUSION	9

TABLE OF AUTHORITIES

CASES: Page

Abood v. Detroit Board of Education, 431 U.S. 209 (1977) 2, 6
Arcara v. Cloud Books, 478 U.S. 697 (1986) 6
Chicago Teachers Union v. Hudson, 475 U.S. 292 (1986) ..... *passim*
Dashielle v. Montgomery County, 925 F.2d 750 (4th Cir. 1991) 9
Dixon v. Love, 431 U.S. 105 (1977) 7
Ellis v. Railway Clerks, 466 U.S. 435 (1984) 5
Fuentes v. Shevin, 407 U.S. 67 (1972) 7
Galda v. Bloustein, 686 F.2d 19 (3d Cir. 1982) 9
Gibson v. The Florida Bar, 906 F.2d 624 (11th Cir. 1990), *cert. dismissed*, 112 S.Ct. 633 (1991) 5
Grunwald v. San Bernardino City Unified School Dist., 917 F.2d 1223 (9th Cir. 1990), *petition for rehearing granted and opinion withdrawn* June 9, 1992 ..... 6, 8
Ingraham v. Wright, 430 U.S. 651 (1977) 7
Lehnert v. Ferris Faculty Assn., —— U.S. ——, 111 S. Ct. 1950 (1991) 2
Mackey v. Montrym, 443 U.S. 1 (1979) 7
Memphis Light, Gas & Water Div. v. Craft, 436 U.S. 1 (1978) 7
Mitchell v. W.T. Grant Co., 416 U.S. 600 (1974) 7
Morrissey v. Brewer, 408 U.S. 471 (1972) 7
Schneider v. Colegio de Abogados de Puerto Rico, 917 F.2d 620 (1st Cir. 1990) 9
Tierney v. City of Toledo, 824 F.2d 1497 (6th Cir. 1987) 8

MISCELLANEOUS:

Cal. Code Regs. Title 8
§ 32992(a) 2
§ 32992(c)(2) 3
§ 32994 3
§ 32995 3
Cal. Gov. Code § 3515.7 1
Cal. Gov. Code § 3540.1 1
Supreme Court Rules, Rule 10.1(a) 8

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

No. 91-1716

JANICE J. JERABEK, JEANNE MAHAN,
DIANNE FOSTER,

Petitioners,

v.

AFL-CIO, *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the Court of Appeal of the State of California

---

RESPONDENTS' BRIEF IN OPPOSITION

STATEMENT

The California statutes governing public sector labor relations permit certain public employers and the labor organizations chosen by those employers' employees as exclusive bargaining representatives to negotiate an agency fee or "fair share" fee agreement. Cal. Gov. Code §§ 3515.7; 3540.1.[1]

This Court, in a series of cases, has ruled that such statutes are constitutional so long as nonmember employees, on stating an objection, are not required to contribute toward union expenditures for political, ideological and other similar non-collective bargaining activities.

---

[1] Such agreements, of course, require the employees in an appropriate collective bargaining unit who choose not to be members of the labor organization to pay a designated fee not to exceed the dues paid by members.

See, e.g., Abood v. Detroit Board of Education, 431 U.S. 209 (1977); *Lehnert v. Ferris Faculty Assn.*, —— U.S. ——, 111 S.Ct. 1950 (1991).

In *Chicago Teachers Union v. Hudson*, 475 U.S. 292, 310 (1986), the Court added that "the constitutional requirements for the Union's collection of agency fees include an adequate explanation of the basis for the fee, a reasonably prompt opportunity to challenge the amount of the fee before an impartial decisionmaker, and an escrow for the amounts reasonably in dispute while such challenges are pending."

In response to the *Hudson* decision, the California Public Employment Relations Board ("PERB") began what became a two-year process of drafting regulations to assure compliance with the *Hudson* procedural requirements by the labor organizations within the Board's jurisdiction. After PERB had heard the views of numerous labor organizations, public employers, public employees, and such organizations as the National Right to Work Legal Defense Foundation—currently representing petitioners in this case—the Board issued comprehensive "Agency Fee Regulations."

The PERB regulations, as here pertinent, provide:

- that each nonmember employee in a collective bargaining unit covered by an agency fee agreement shall receive an annual written notice from the labor organization acting as the unit's exclusive representative specifying the amount of the agency fee payable by nonmembers, the basis for its calculation, and the procedure for objecting to the amount of the fee (Cal. Code Regs. tit. 8, § 32992 (a) (1989));
- that each such labor organization shall permit nonmembers to object to the amount of the agency fee up to thirty days after receiving the mandatory notice, and shall, if such objection is filed, provide a prompt, cost-free hearing before an impartial

decisionmaker, with the results announced within thirty days of the hearing (Cal. Code Regs. tit. 8, § 32994); and

- that pending the resolution of any such objections, levied fees must be held in an escrow account, and not spent for any purpose by the labor organization (Cal. Code Regs. tit. 8, § 32995).

On appeal, these regulations were upheld in their entirety by the Court of Appeal of the State of California, Third Appellate Division. The Supreme Court of the State of California then denied a petition to review the Court of Appeal decision.

ARGUMENT

The *certiorari* petition raises an exceedingly technical, highly abstract question in a context that so far as we can ascertain is *sui generis*. That question was correctly decided below. There is no basis for this Court's review.

1. The petitioners challenge only a single aspect of California PERB's comprehensive regulations implementing this Court's *Chicago Teachers Union v. Hudson* decision: the provision that permits unions *either* to provide the requisite explanation of the basis for an agency fee to nonmember fee payers thirty days *before* collecting the first agency fee in *any given fee year*, *or* to provide the notice *concurrently* with the first fee collection of the year, provided that "all agency fees so noticed shall be held in escrow in toto until all objectors are identified." Cal. Code Regs. tit. 8, § 32992(c)(2) (emphasis added).

As they are at pains to point out, petitioners do *not* contend that a *Hudson* notice provided 30 days before first collection is invalid or that the holding of the entire agency fee in escrow pending identification of objectors is invalid, but *only* that a notice contemporaneous with first collection is *per se* invalid.[2] And, petitioners contend

---

[2] *See* Petition for a Writ of *Certiorari* ("Pet."), at 8 nn.8 & 9 ("Jerabek never challenged the regulations' escrow requirements

that *Hudson* requires the conclusion they advocate. That contention rests on a misreading of the opinion and a studious refusal to confront its logic.

Petitioners rest their invocation of *Hudson* on one sentence from that opinion: that "the constitutional requirements for the Union's collection of agency fees include an adequate explanation of the basis for the fee, a reasonably prompt opportunity to challenge the amount of the fee before an impartial decisionmaker, and an escrow for the amounts reasonably in dispute while such challenges are pending." 475 U.S. at 310. These words simply do not say what petitioners seek to make them say.

Hudson in no way indicates that, as a matter of time sequence, these three procedural "requirements" must all be completed *before* any fee collection can take place. Indeed, it is quite clear from the *Hudson* opinion as a whole that the first of the two requirements *not* challenged here—a "reasonably prompt opportunity to challenge the amount of the fee before an impartial decisionmaker"—will *not* be completed before any fees are collected, but afterwards. *See* 475 U.S. at 309-310. And the requirement of "an escrow for the amounts reasonably in dispute while such challenges are pending," by its nature, is an exclusively post-collection requirement. *Id.*

At least equally to the point, *Hudson* makes clear that the purpose of the notice requirement is to assure that "potential objectors are given sufficient information to gauge the propriety of the union's fee" so that they can make a knowledgeable decision as to whether to object to paying for union non-collective bargaining expenditures, or to challenge the union's calculation of chargeable expenditures. *See* 475 U.S. at 306. And, the PERB rule—that notice is to be provided *a reasonable period before*

---

or the unions' use of nonmembers' funds. . . . [S]ince escrow is required, escrow was not an issue before the court of appeal. . . .").

any objection must be lodged—fully vindicates the purpose of providing the fee payer "a fair opportunity to identify the impact of the governmental action on his interests and to assert a meritorious First Amendment claim." 475 U.S. at 303. In contrast, *no* purpose would be served by insisting upon a pre-collection notice when the relevant time for objecting to the amount of the fee and the time for holding a hearing on those objections both occur well *after* the first of a series of fee collections that will take place over a fee year.[8]

---

[8] The propriety of a pre-collection notice, standing alone, has nothing to do with any "rebate" issue. *Cf.* Pet. 7. It is true, of course, that if labor organizations *must* provide objectors with an advance reduction of agency fees, and may not, instead, avoid temporary subsidization of political and ideological expenditures by a brief escrowing of funds, then as a practical matter the notice would have to be provided in time to insure that the labor organization would not collect, even for placement into escrow, an amount greater than the organization is legally permitted to assess nonmembers.

But, as noted above, petitioners insist that they are *not* raising any advance reduction issue, or challenging the escrow alternative; indeed, they chide the Court of Appeal for treating with those issues in its opinion. Pet. 8 nn. 8 & 9. Thus, petitioners are *not* raising the issues presented in cases such as *Gibson v. The Florida Bar*, 906 F.2d 624, 631 (11th Cir. 1990), *cert. dismissed*, 112 S.Ct. 633 (1991), and those discussed *infra* n.7, p. 9.

Petitioners' unwillingness to challenge the Court of Appeal's conclusion concerning the propriety of the escrow procedure is well-advised. As the state court noted, *Ellis v. Railway Clerks*, 466 U.S. 435, 444 (1984), holds that unions may not exact and *use* union dues and then provide a later rebate. *See* Pet. App. 6a-7a. At the same time, *Ellis* expressly determined that *either* "advance reduction of dues *and/or interest-bearing escrow accounts*" are "acceptable alternatives" to the impermissible rebate system, since both avoid union expenditure of objectors' fees for nonchargeable purposes. 466 U.S. at 444 (emphasis supplied), *quoted at* Pet. App. 7a. Nothing in *Hudson* purports to overrule this explicit statement in *Ellis*.

As the Court of Appeal also noted, there is no basis for positing a separate First Amendment interest in retaining use of the (temporarily) exacted fees for the fee payers' own expressive purposes, since " 'if this argument were accepted, every suit for money against

Hudson, moreover, reaffirms that the overall "objective" of the law regulating agency fee agreements "must be to devise a way of preventing compulsory subsidization of ideological activity by employees who object thereto without restricting the Union's ability to require every employee to contribute to the cost of collective-bargaining activities." 475 U.S. at 302 (quoting *Abood v. Detroit Board of Education*, *supra*, 431 U.S. at 237). As PERB recognized, and for the reasons we develop in the margin, a rigid pre-collection notice requirement would defeat this objective.[4]

---

a party acting under color of governmental authority would automatically become a First Amendment case.'" Pet. App. 12a (*quoting Grunwald v. San Bernardino City Unified School Dist.*, 917 F.2d 1223, 1231 (9th Cir. 1990) (Kozinski, J., dissenting), *petition for rehearing granted and opinion withdrawn* June 9, 1992). *See also Arcara v. Cloud Books*, 478 U.S. 697, 705-06 (1986).

Lest we be misunderstood, we hasten to note that even if an "advance reduction" *were* required—and even if the "advance reduction" issue were presented here—it still would not follow that notice must precede the *first monthly collection of agency fees in each fee year*. Under the PERB regulations and under *Hudson*, agency fees typically are computed on an annual basis. *See* 475 U.S. at 307 & n.18. Hence, providing notice sufficiently early in the year to ensure that all objections would be resolved before the labor organization had collected more than the chargeable amount *for the year* satisfies any advance reduction requirement that may obtain. And notice contemporaneous with the first monthly collection is normally more than sufficient to meet this rule.

[4] In school districts, for example, the vast majority of newly hired teachers begin a ten-month employment simultaneously in September, following which it takes approximately one month for the labor organization to determine who the new teachers are and who among them chooses to be a fee payer rather than a union member. Consequently, if fee collection could not begin until after notice were given to fee payers, there could be a substantial delay in collection (thus requiring greater monthly payments by the fee payer once collection began). And, because many school systems require that payroll deductions of due and fees be in a uniform amount for all teachers, as a practical matter the labor organization might have to delay not only the collection of agency fees, but the collection of membership dues as well. Such a pre-collection notice requirement

2. Nor is it the case, as petitioners maintain, that a pre-collection notice is necessary because "pre-deprivation notice is the usual constitutional requirement." Pet. at 7 (citing general procedural due process cases).

For one thing, *Hudson* analyzed the constitutionality of agency fee procedures from a different perspective and therefore explicitly disavows reliance on the general procedural due process cases. 475 U.S. at 304, n.13. For a second, the procedural due process cases do not in any event support petitioners.

"The purpose of notice under the Due Process Clause is to apprise the affected individual of, and permit adequate preparation for, an impending 'hearing.'" *Memphis Light, Gas & Water Div. v. Craft*, 436 U.S. 1, 14 (1978). As we have noted, *Hudson* makes clear, and petitioners do not dispute, that the required agency fee hearing is to be conducted well after the collection of fees has begun. *See* 475 U.S. at 309-310.[5] Accordingly, notice need not precede the first monthly collection of fees in order "to apprise the affected individual of, and permit adequate preparation for, [the] impending hearing.'"

3. Petitioners' suggestion that a grant of *certiorari* is necessary to resolve a conflict between the decision below

---

would thus undermine the state interests that animate the agency fee system. And, it is unlikely in the extreme that the fee payers' interests will be served if, as a consequence of such a requirement, they must pay a year's worth of fees in a foreshortened period.

[5] This aspect of *Hudson* comports with "the usual rule," *Mitchell v. W.T. Grant Co.*, 416 U.S. 600, 603 (1974), that *post*-deprivation notice and hearings constitute "such procedural protections as the particular situation demands," *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972). *See also*, approving the taking of liberty or property without advance notice, *Mackey v. Montrym*, 443 U.S. 1, 19 (1979); *Dixon v. Love*, 431 U.S. 105, 109 (1977); *Ingraham v. Wright*, 430 U.S. 651, 678-79 (1977).

In those few instances in which pre-deprivation notice has been required, a pre-deprivation *hearing* of some kind was required as well. *See, e.g., Fuentes v. Shevin*, 407 U.S. 67, 81-82 (1972).

and those of several federal courts of appeals on the necessity of a pre-collection notice in the agency fee context is wholly unconvincing.

Preliminarily, this Court's Rules do not speak of a conflict between a state intermediate appellate court and federal appellate courts as a basis for granting *certiorari*. The rules refer to a conflict involving the State's "court of last resort." Supreme Court Rules, Rule 10.1(a). Here, California's "court of last resort"—the California Supreme Court—did not grant review of the Court of Appeal's decision, and has not spoken itself on the issue here presented. Pet. App. 19a.

There is, in any event, *no* federal appellate opinion addressing—much less upholding—petitioners' claim here: that a pre-collection notice of the basis for an agency fee is required *even though an advance reduction in the amount of the fee is not required.*

The Ninth Circuit's opinion in *Grunwald v. San Bernardino County Unified School Dist.*, *supra*, upon which petitioners most heavily rely, has been withdrawn since the *certiorari* petition was filed.[6] Obviously, there is no need to grant *certiorari* to resolve a conflict with an opinion that no longer exists. And, while *Tierney v. City of Toledo*, 824 F.2d 1497 (6th Cir. 1987), does hold that a pre-collection notice is required, that holding was the necessary corollary of *Tierney*'s earlier conclusion, *disavowed by petitioners here*, that an advance reduction of agency fees is also required. *See id.* at 1502-03. Nothing in *Tierney* indicates that the Sixth Circuit would hold that a pre-collection notice is necessary *even though* no pre-collection objection and advance reduction are

---

[6] The *Grunwald* opinion was withdrawn by a 2-1 vote of the panel that had decided the case. The panel announced that "[a] new opinion will be filed." Order of June 9, 1991.

contemplated. And for the reasons indicated above, pp. 3-7, such a conclusion lacks any logical justification.[7]

CONCLUSION

For the reasons stated above, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

MARSHA S. BERZON
(Counsel of Record)
177 Post Street
San Francisco, CA 94108
(415) 421-7151

DIANE ROSS
1705 Murchison Drive
Burlingame, CA 94010

LARRY P. WEINBERG
1101 17th Street, N.W.
Washington, D.C. 20036

JONATHAN P. HIATT
1313 L Street, N.W.
Washington, D.C. 20005

WILLIAM C. HEATH
2045 Lundy Avenue
San Jose, CA 95131

Counsel for Respondents

---

[7] The other three "conflict" cases cited by petitioners are even further afield.

Dashielle v. Montgomery County, 925 F.2d 750 (4th Cir. 1991) concerned only the "narrow issue . . . whether the segregating function, by which expenses are allocated into the nonchargeable and chargeable categories, must be audited by an independent accountant." 925 F.2d at 754. While the Fourth Circuit indicated, in passing, that the notice containing the audit must be given in advance of fee collection, that issue was not squarely before the Court. Further, the Fourth Circuit's comments assumed, like *Tierney*, that an advance notice is *not* an independent requirement but one contingent upon an advance fee reduction requirement. 925 F.2d at 756.

Schneider v. Colegio de Abogados de Puerto Rico, 917 F.2d 620 (1st Cir. 1990) concerned not agency fees but compulsory bar dues, and in any event only briefly mentioned an advance notice as "*one* way for an objection procedure to work," *id.* at 635 n.22, not the only way.

Finally, *Galda v. Bloustein*, 686 F.2d 19, 168 n.16 (3d Cir. 1982), again was not decided in the agency fee context, and explicitly left open the question of its application in that context. Further, the supposed holding petitioners rely upon is a "*cf.*" quotation from a secondary source, and is, once again, addressed primarily to the advance reduction issue.